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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIE CROCKETT, Defendant and Appellant.	B267614 (Los Angeles County Super. Ct. No. SA071297)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden Fox, Judge. Affirmed and remanded with directions.

Christopher Allan Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Idan Ivri and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Willie Crockett appealed his convictions for, among other things, robbery, aggravated assault, attempted murder, attempted robbery, and attempted premeditated murder of a police officer, with gang and firearm-use enhancements. In a nonpublished opinion issued on February 16, 2018, we affirmed his convictions after rejecting his contentions that the evidence was insufficient to support a gang enhancement and the trial court committed instructional and evidentiary errors. However, we remanded for correction of a sentencing error and to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancement in light of a then-recent amendment to Penal Code section 12022.53.[1] Thereafter, on May 23, 2018, our Supreme Court granted review and deferred briefing pending disposition of *People v. Mateo* (rev. granted May 11, 2016, S232674). While Crockett's appeal was pending, the Legislature enacted Senate Bill No. 1437 (S.B. 1437) which, among other things, amended the law governing application of the natural and probable consequences doctrine as it relates to murder. On April 10, 2019, the Supreme Court transferred the instant matter to us with directions to vacate our opinion and reconsider the cause in light of S.B. 1437.

In accordance with our Supreme Court's order, we vacate our February 16, 2018 nonpublished opinion. After considering the parties' supplemental briefs, we conclude that the changes wrought by S.B. 1437 do not apply retroactively to nonfinal judgments on appeal. Moreover, S.B. 1437 does not apply to the offense of attempted murder. Our decision regarding Crockett's

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[1] All further undesignated statutory references are to the Penal Code unless otherwise specified.

previously raised claims of error remains the same. We therefore affirm Crockett's convictions and remand for resentencing.

BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *Robbery of Wachovia Bank (counts 1–3).*

On April 30, 2009, Crockett entered a Los Angeles branch of Wachovia Bank. He approached Samir A., a bank teller, and presented a note announcing that a robbery was in progress and that he had a bomb. As Samir gathered money, Crockett proceeded to Christina M., the teller next to Samir, and demanded money from her. Crockett also handed the note to a third teller, Anthony C. All three tellers gave Crockett cash containing dye packs.

Shortly after Crockett left the bank, a bank employee saw a plume of red smoke consistent with a dye pack exploding. Los Angeles Police Department (LAPD) officers later found some items stained with red dye in an alley near the bank. Crockett's fingerprints and handwriting were found on the robbery note. Samir and Anthony identified Crockett as the robber from six-pack photographic lineups.

b. *Shooting during attempted pawnshop robbery (counts 4–9, 11).*

On June 9, 2009, Jan S., Jose C., Jose R., and Robert H. were working at the Long Beach Pawn Shop. Crockett entered the store, approached Jan, and said he wanted to buy a ring for his girlfriend. Jan referred Crockett to Robert, who was in charge of selling jewelry. Robert was armed with a handgun

because there had been two prior attempted robberies at the store.

When Robert offered to assist him, Crockett yelled out "Now," pulled a handgun from his waistband, and announced a robbery. A second gunman ran into the store and jumped over the counter. When Crockett aimed his gun at Jan, Robert shot at him; Robert believed he had hit Crockett in the leg. The second gunman jumped back over the counter and started crawling toward the front door with Crockett. A third man at the front door then started shooting into the store. Robert was wounded by a gunshot to the face, but he was not sure which of the three perpetrators had shot him.

Long Beach Police Detective Donald Collier testified that blood recovered from the sidewalk outside the pawnshop was matched to a man named Baleegh Brown. From the surveillance videotape, Detective Collier identified Brown as the second robber to enter the pawnshop. Detective Collier was not able immediately to identify Crockett, but ultimately found a photograph on Myspace of a man wearing the same orange suit Crockett had worn during the robbery. All four of the pawnshop employees, as well as a customer, Tracy W., identified Crockett from photo arrays as one of the perpetrators.

Detective Collier described the pawnshop incident as "what we call a takeover robbery where you have multiple suspects going into a commercial business with the use of violence or threatened violence." On the day of the attempted pawnshop robbery, Detective Collier contacted local hospitals to see if any of them had treated gunshot wounds; none had.

c. *Shooting during Crockett's arrest (counts 12, 15, 16, 19, 22, 23, 26, 27).*

Crockett was a member of the Black P Stone (BPS) gang. LAPD Detective Cedric Washington testified he had served as "a gang expert for several gangs, including the Black P Stone gang," and had qualified as an expert in court regarding the BPS gang. Because of his knowledge of the BPS gang, other police officers approached him for help in locating Crockett in the aftermath of the Wachovia and pawnshop crimes. Detective Washington testified that he had never had personal contact with Crockett, but he knew of him: "I had seen him in the area over the years that he's been a member of the Black P Stone gang." Detective Washington continued, "I had seen [Crockett] around. I was familiar with him through confidential reliable informants. I was familiar with him through other gang members and other citizens and community members within the area that he resided and committed crimes." Ultimately, Detective Washington traced Crockett to 4611 Martin Luther King Junior Boulevard, apartment 187 (apartment 187), and obtained a search warrant of the apartment.

On July 1, 2009, police observed Crockett and others in apartment 187. Detective Washington went to the location and confirmed Crockett's presence; several known BPS members, including Christopher Singh, J.B. Jennings, and Richard Bennett were also seen in the apartment. When a SWAT unit arrived at the scene, Crockett ran outside onto a patio, noticed the police presence, and ran back inside, where he was seen peering out from the apartment windows. Members of the SWAT unit had already started to enter the apartment building, but after learning that the operation had been compromised, they stopped

in front of a fire door leading to the hallway where apartment 187 was located. Detective Washington testified: "[I]mmediately after Crockett went inside, I heard several . . . gunshots going off from a rifle. Very distinguishable sound of an AK47." Two minutes later, Crockett ran out of apartment 187 and into the hallway where the police were waiting. Crockett was unarmed; he was tackled and arrested.

An LAPD criminalist testified that the gunshots fired from apartment 187 had gone through an adjoining wall to apartment 189; two bullets were found embedded in a second wall separating apartment 189 from the apartment building hallway. Inside apartment 187, police found several loaded weapons: an AK47, a shotgun, and a .38-caliber revolver. They also found a bottle of lidocaine, a bandage in an open packet, two bottles of Neosporin, scissors, gloves, gauze, iodine, bottles of hydrogen peroxide, latex gloves, and a medical dressing. Detective Collier, who was present at Crockett's arrest, characterized these as "a lot of medical items . . . that could be used to cleanse or care for a wound." As noted, *ante*, Detective Collier had checked with hospitals on the day of the pawnshop robbery for reports of gunshot victims, but he had not learned of any. X-rays taken in November 2011 disclosed two bullets lodged in Crockett's pelvis. Medical testimony indicated that such a wound would not necessarily require hospital treatment.

d. *Gang expert's testimony.*

LAPD Detective Phil Rodriguez testified as an expert about BPS. He described BPS as one of the largest African-American gangs in the country, with 950 to 1,000 members in Los Angeles, and about 15,000 members nationwide. He explained that the gang was roughly divided into two main cliques: the Jungles

clique and the Bities clique. Detective Rodriguez testified the gang's primary activities include robbery, assault with deadly weapons, narcotics trafficking, murder, attempted murder, carjacking, and rape.

Detective Rodriguez testified Crockett, a known BPS member, was known as "Janky" or "Corn Nut." Although Detective Rodriguez did not know Crockett personally, he had learned about Crockett's gang monikers from Crockett's admissions to other police officers. Detective Rodriguez was shown photographs of two of Crockett's tattoos: the letters "BPS" on the back of Crockett's neck, and a large dollar sign on his torso. Detective Rodriguez testified "BPS" was one of the "more common tattoos" worn by BPS members, and that the dollar sign tattoo signified that Crockett was "part of an inner [clique] within the Jungles" clique known as "the Stevely Crew." The Stevely Crew was "known for getting money by any means necessary, commonly bank robberies and street robberies."

Detective Rodriguez testified that he believed Crockett to be an active BPS member because Crockett "was observed . . . frequenting with other gang members. He was frequenting gang locations with gang tattoos, self-admitted to gang officers, and was arrested for gang crimes." Asked if there were any particular police officers on whom he relied for this opinion, Detective Rodriguez named three officers, but he did not reveal anything about the circumstances surrounding his conversations with those officers. Detective Rodriguez was shown photographs taken during the attempted pawnshop robbery, and he identified the other two robbers as Baleegh Brown and Keshawn Tyrell. Detective Rodriguez testified he had personal knowledge that

Brown was an active BPS member in June 2009.[2] Shown the photograph that Detective Collier had found on Myspace, Detective Rodriguez said Crockett was standing next to Christopher Singh, whom Detective Rodriguez knew to be a BPS gang member.[3] Detective Rodriguez further testified that the building that housed apartment 187 was within BPS gang territory. Finally, he testified that he personally knew J.B. Jennings, who had run from apartment 187 shortly before the police raid, to be a member of the Jungles clique of the BPS gang.

Presented with a set of hypothetical questions based on the facts of this case, Detective Rodriguez testified that the attempted pawnshop robbery and the shooting at apartment 187 would have inured to the benefit of both the BPS gang and the individual participants: "The effect would be people in the gang would know who are actively doing these takeover robberies. . . . [¶] And part of the recognition you get is how you're taken into custody. How violent you were. Did you lead them on a pursuit? Did you fight with officers? Did you shoot it out with officers? That is all taken into account as far as gang members and your

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[2] Detective Rodriguez testified Brown was "a self-admitted and documented BPS gang member whom I've arrested on numerous occasions. His moniker is G-Snap, but his updated moniker is Tiny Mumu. Currently in custody." Brown was part of the Bities clique within BPS.

[3] Detective Rodriguez testified Singh was "a documented and self-admitted BPS gang member" who was also known as "Little Chris." Detective Rodriguez had personal contact with Singh "numerous times" and had also "seen him at fellow gang court cases."

status in the gang. That's a big factor in being a gang member." The following colloquy then occurred:

"Q. . . . If a gang member, a BPS gang member who's wanted for some type of crime, while the police are serving a search warrant, rather than surrender, he shoots it out with the police or fires shots at or toward the police, does that affect his reputation?

"A. Yes.

"Q. In what way?

"A. It shows that you didn't go down easy. And younger gang members and even older gang members, they take pride in that. It glorifies—a lot of these pursuits and shootings are on the news broadcast, so . . . you know what gang may be attached to that specific location. [¶] A lot of the gang members who resist when they're taken into custody, they are glorified. When I say glorified . . . for example, Mr. Crockett. I monitor social media. They are constantly—on his birthday they are requesting for Free Janky Stone, Real, True BPS. They're glorified."

Detective Rodriguez testified that violent resistance to a warrant also helps the gang: "Part of it is the recruitment. Young gang members want to be part of . . . one of the bigger and violent gangs. Part of it is money. The larger the territory you own . . . for example, Crenshaw. You've got narcotics trafficking, robberies, burglaries, and not many people are going to confront BPS."

2. *Defense evidence.*

The defense rested without putting on any evidence.

3. *Trial outcome*.

The jury convicted Crockett of three counts of robbery, with gang enhancements, arising out of the Wachovia Bank robbery

(Pen. Code, §§ 211, 186.22, subd. (b)); one count of aggravated assault, one count of attempted murder, and four counts of attempted robbery, with firearm use and gang enhancements, arising out of the pawnshop attempted robbery (§§ 245, 664, 187, 664, 211, 12022.5, 12022.53, 186.22, subd. (b)); and three counts of attempted premeditated murder of a peace officer, one count of shooting at an inhabited dwelling, and three counts of aggravated assault on a peace officer, with firearm use and gang enhancements, arising out of the shooting incident during which Crockett was arrested (§§ 664, 187, 246, 245, subd. (d)(2), 12022.5, 12022.53, 186.22, subd. (b)).[4]

The court sentenced Crockett to a total prison term of 238 years 8 months to life. That sentence did not include any time relating to the jury's true findings on the gang enhancements.[5]

CONTENTIONS

Crockett contends: (1) there was insufficient evidence to sustain the jury's true findings on the gang enhancement arising out of the shooting incident during which Crockett was arrested;

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[4] The trial court dismissed (at the prosecution's request) two additional convictions for possession of a firearm by felon ([former] §12021) and a prior serious felony conviction allegation (§ 1170.12).

[5] As it appeared that the trial court did not impose sentence on the gang enhancements, we asked the parties by letter dated January 16, 2018, whether any error resulting from the true findings on the enhancements was harmless. After reviewing the parties' supplemental letter briefs, we conclude that we should address Crockett's contention regarding the sufficiency of the evidence to support the gang enhancement.

(2) all the gang enhancements must be reversed because the gang testimony was based on inadmissible hearsay evidence in violation of California law and the federal confrontation clause; (3) the attempted murder conviction arising out of the pawnshop attempted robbery must be reversed because there was insufficient evidence of premeditation; (4) the case must be remanded for resentencing under the recent amendments to section 12022.53; and (5) S.B. 1437 applies retroactively to defendant's conviction for attempted murder.

DISCUSSION

1. *There was sufficient evidence to support the gang enhancements arising out of the shooting incident during which Crockett was arrested.*

Crockett contends the evidence was insufficient to support the gang enhancement related to the July 1, 2009, shooting incident during which he was arrested. We disagree.

a. *Standard of review.*

"The standard of appellate review for determining the sufficiency of the evidence supporting an enhancement is the same as that applied to a conviction. [Citations.] Like a conviction unsupported by substantial evidence, a true finding on a gang enhancement without sufficient support in the evidence violates a defendant's federal and state constitutional rights and must be reversed. [Citations.]" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947 (*Franklin*).)

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable

trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*).)

b. *Legal principles.*

In 1988 the Legislature enacted section 186.20 et seq., known as the California Street Terrorism Enforcement and Prevention (STEP) Act, to combat gang-related crimes and violence. (*People v. Prunty* (2015) 62 Cal.4th 59, 66–67.) Section 186.22, subdivision (b)(1), imposes various sentencing enhancements on defendants convicted of gang-related felonies committed with the specific intent to promote, further, or assist in any criminal conduct by gang members.

"There are two prongs to the gang enhancement under section 186.22, subdivision (b)(1), both of which must be established by the evidence. [Citation.] The first prong requires proof that the underlying felony was 'gang-related,' that is, the defendant committed the charged offense 'for the benefit of, at the direction of, or in association with any criminal street gang.' [Citations.] The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' [Citations.]" (*Franklin*, *supra*, 248 Cal.App.4th at p. 948.)

"As the Supreme Court has noted, '[t]he prosecution's evidence must permit the jury to infer that the "gang" that the defendant sought to benefit, and the "gang" that the prosecution proves to exist, are one and the same.' [Citation.] 'That gang is defined in section 186.22[, subdivision] (f), which provides that the gang must consist of "three or more persons" who have as one of their "primary activities the commission of" certain enumerated criminal acts; who share "a common name or common identifying sign or symbol"; and "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." ' [Citations.]

" 'In order to prove the elements of the criminal street gang enhancement, the prosecution may . . . present expert testimony on criminal street gangs.' [Citation.] ' "Expert opinion that particular criminal conduct benefitted a gang" is not only permissible but can be sufficient to support [a] gang enhancement.' [Citations.] While an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the 'hypothetical question must be rooted in facts shown by the evidence.' [Citation.] Indeed, an 'expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors." ' [Citations.]" (*Franklin*, *supra*, 248 Cal.App.4th at pp. 948–949.)

c. *Discussion*.

Crockett contends there was insufficient evidence to support a gang enhancement relating to the shooting at apartment 187. He argues: "No one saw appellant fire the gun; no one heard what appellant said, if anything, when he fired the gun; and the evidence showed that appellant was the only person in the apartment when he fired the gun. [¶] Notably, the

People's gang expert did not offer the opinion that appellant committed the shooting for the benefit of, at the direction of, or in association with the gang; nor did the expert offer the opinion that appellant had the specific intent to benefit the gang when he fired the gun."

We are not persuaded. As to the first prong, Detective Rodriguez offered his opinion that Crockett had committed the shooting for the benefit of the BPS gang because the reputation of the gang was enhanced whenever gang members fought the police to try to avoid being taken into custody. As for Crockett's speculation that fellow gang members and community members might never learn that Crockett resisted arrest, the jury reasonably could have concluded that the appearance of a SWAT unit at apartment 187 would have telegraphed Crockett's actions to the neighborhood.

As to the second prong, the gang enhancement's specific intent element requires only a "specific intent to promote, further, or assist in *any criminal conduct by gang members*." (§ 186.22, subd. (b)(1) (italics added); see *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["specific intent to *benefit* the gang is not required"].) This element may be satisfied even though arguably the only gang member's criminal conduct that was furthered was the criminal conduct of defendant himself: "There is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense defendant commits. To the contrary, the specific intent required by the statute is 'to promote, further, or assist in *any* criminal conduct by gang members.' [Citation.] Therefore, defendant's own [underlying offense] qualified as the gang-

related criminal activity. No further evidence on this element was necessary." (*People v. Hill* (2006) 142 Cal.App.4th 770, 774 [gang enhancement properly imposed where defendant threatened victim with gun, after minor traffic accident, because he felt victim had disrespected his gang].) Hence, the jury reasonably could have inferred that Crockett's act of shooting was intended to promote criminal conduct by a gang member: he acted both to further his gang's reputation and to enhance his own standing within the gang.

Accordingly, substantial evidence supported the jury's true finding as to the gang enhancements relating to the shooting incident at apartment 187.

2. *Crockett has not established that admission of gang expert testimony violated his confrontation rights or was prejudicially erroneous.*

Crockett contends that, under the California Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the admission of the prosecution gang expert's testimony violated both California hearsay law and Crockett's Sixth Amendment right of confrontation. Crockett specifically asserts that Detective Rodriguez impermissibly relied on testimonial hearsay in offering his opinion that Crockett belonged to BPS because the opinion was based on case-specific, out-of-court statements by persons who did not testify and were not subject to prior cross-examination. Crockett further contends that the admissible gang evidence was insufficient to prove either that he was a member of BPS or that his involvement in the pawnshop and police shooting incidents were committed to

benefit his gang.[6] Based on the legal principles set forth in *Sanchez*, we conclude that there was no confrontation clause violation, and although the admission of some of Detective Rodriguez's testimony may have violated California hearsay law, admission of this evidence amounted to only harmless error.

a. *The* Sanchez *decision*.

This court summarized the *Sanchez* decision in *People v. Iraheta* (2017) 14 Cal.App.5th 1228 (*Iraheta*), as follows:

"The Sixth Amendment provides that an accused has the right to be confronted with the witnesses against him. (U.S. Const., 6th Amend.; *Sanchez*, *supra*, 63 Cal.4th at p. 679.) In the seminal case of *Crawford v. Washington* (2004) 541 U.S. 36, the high court overruled its prior precedent and held that the Sixth Amendment generally bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id*. at p. 68; *Davis v. Washington* (2006) 547 U.S. 813, 821; *Sanchez*, at p. 680.) Although *Crawford* set forth a new

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[6] The Attorney General argues Crockett forfeited this issue by failing to object to Detective Rodriguez's testimony on hearsay or confrontation clause grounds at trial. However, any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* case law, which generally held that evidence that was the "basis" for expert testimony is not admitted for its truth, and thus, does not implicate the hearsay doctrine or the confrontation clause. (See *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13 [disapproving "prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction . . . sufficiently addresses hearsay and confrontation concerns"].) We therefore address the merits of Crockett's claim.

standard for admissibility, the court declined to provide a comprehensive definition of 'testimonial.' (*Crawford*, at p. 68; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1134.) [¶] . . . [¶]

"In *Sanchez*, the defendant was charged with drug and firearm offenses and active participation in the Delhi street gang, along with a section 186.22 gang enhancement. At trial, a gang expert relied upon a 'STEP notice,'[7] police documents, and an FI card[8] as the basis for his expert opinion. Those documents indicated Sanchez associated with, and had been repeatedly contacted by police while in the presence of, Delhi gang members. (*Sanchez*, *supra*, 63 Cal.4th at pp. 671–673.) The expert had never met Sanchez and had not been present when the STEP notice was issued or during any of Sanchez's other police contacts. His knowledge was derived solely from the police reports and FI card. Based on the information in the STEP notice, the police documents, and the FI cards, and the circumstances of the offense at issue, the expert opined that Sanchez was a member of the Delhi gang and the charged crimes benefitted the gang. (*Id*. at p. 673.)

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7 A STEP notice provides to the recipient information regarding potential penalties for gang-related criminal activity. The issuing officer also records the date, time, statements made at the time of the interaction, and identifying information. (*Sanchez*, *supra*, 63 Cal.4th at p. 672.)

8 *Sanchez* described FI cards thusly: "Officers also prepare small report forms called field identification or 'FI' cards that record an officer's contact with an individual. The form contains personal information, the date and time of contact, associates, nicknames, etc.," and may record statements made at the time of the interaction. (*Sanchez*, *supra*, 63 Cal.4th at p. 672.)

"*Sanchez* held 'the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford*. The error was not harmless beyond a reasonable doubt.' (*Sanchez*, *supra*, 63 Cal.4th at pp. 670–671.) Accordingly, the court reversed the true findings on the street gang enhancements. (*Id*. at p. 671.)

"*Sanchez* drew a distinction between an expert's general knowledge and '*case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.' (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) At common law, the distinction between case-specific and background facts had been honored by the use of hypothetical questions, in which an examiner could ask an expert to assume certain case-specific facts for which there was independent competent evidence. (*Id*. at pp. 676–677.) However, over time the distinction between background information and case-specific hearsay had become blurred, leading to the rule that an expert could explain the 'matter' upon which he or she relied, even if that matter was hearsay. (*Id*. at pp. 678–679.) California law allowed such hearsay 'basis' testimony if a limiting instruction was given; in cases where an instruction was inadequate, the evidence could be excluded under Evidence Code section 352. (*Sanchez*, at p. 679.)

"Overruling prior precedent, *Sanchez* concluded 'this paradigm is no longer tenable because an expert's testimony

regarding the basis for an opinion *must* be considered for its truth by the jury.' (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) 'Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. *If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner*.' (*Id*. at p. 684, italics added, fn. omitted.)

"*Sanchez* made clear that its holding did not do away with all gang expert testimony. 'Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so,' that is, he or she may 'relate generally' the 'kind and source of the "matter" upon which his opinion rests.' (*Sanchez*, *supra*, 63 Cal.4th at pp. 685–686.) 'Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception.' (*Id*. at p. 685.) 'What an expert *cannot* do is relate as true case-specific facts asserted in hearsay

statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.' (*Id*. at p. 686.)

"Thus, in regard to case-specific hearsay, *Sanchez* 'jettisoned' the former 'not-admitted-for-its-truth' rationale underlying the admission of expert basis testimony, and occasioned a 'paradigm shift' in the law. [Citations.]

"*Sanchez* then turned to consideration of what constitutes testimonial hearsay, a question not yet clearly defined by the United States Supreme Court. (*Sanchez*, *supra*, 63 Cal.4th at p. 687.) Prior testimony and police interrogations are clearly testimonial. (*Ibid*.) *Sanchez* explained that beyond these clear categories, the high court had articulated several formulations for determining the testimonial nature of out-of-court statements. Under the 'primary purpose' test, '[t]estimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial.' (*Sanchez*, at p. 689.) Whether the statements were spontaneous or given in a formal or informal setting is also relevant. (*Id*. at pp. 693–694; see *Ohio v. Clark* (2015) 576 U.S. ___ [192 L.Ed.2d 306, 135 S.Ct. 2173].) *Sanchez* concluded that statements about a completed crime, made to an investigating officer by a nontestifying witness (unless made in the context of an ongoing emergency or for some primary purpose other than preserving facts for use at trial), were generally testimonial. (*Sanchez*, at p. 694.) Accordingly, the police reports in *Sanchez* were testimonial. (*Ibid*.) Likewise, at least the portion of a STEP notice retained by police is testimonial. That portion records the defendant's biographical

information, whom he was with, and what statements he made; the officer's purpose is to establish facts to be later used against the defendant or his companions at trial; and the notice is part of an official police form containing the officer's sworn attestation. (*Sanchez*, at pp. 696–697.)

"The court concluded FI cards 'may be testimonial.' (*Sanchez*, *supra*, 63 Cal.4th at p. 697.) *Sanchez* explained that '[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial.' (*Sanchez*, at p. 697.) However, because the parties had not focused on the point below, and the origins of the FI cards at issue there were confusing, *Sanchez* did not decide whether the content was testimonial or not, given that the expert's testimony based on the police and STEP reports required reversal in any event. (*Id*. at pp. 697–698.)" (*Iraheta*, *supra*, 14 Cal.App.5th at pp. 1243–1246.)

b. *Crockett has not established that Detective Rodriguez's expert opinion was based on testimonial hearsay; thus, he has not established a violation of the confrontation clause*.

Crockett argues Detective Rodriguez's expert opinion was based on testimonial hearsay—i.e., on the extra-judicial statements of the three non-testifying police officers to whom Detective Rodriguez had spoken. Crockett argues: "Although there was other evidence linking appellant to the Black P Stones—namely his tattoos—the jury surely relied in part on the improperly admitted fact that other, non-testifying officers thought appellant was a Black P Stones member." There was, Crockett argues, prejudicial error in admitting this evidence.

We disagree. Detective Rodriguez opined that Crockett was an active BPS gang member because "[h]e was observed . . . frequenting with other gang members. He was frequenting gang locations with gang tattoos, self-admitted to gang officers, and was arrested for gang crimes." Detective Rodriguez further testified he knew Crockett's two gang monikers "[b]y his self-admission to former gang officers, . . . resources that I've used, prior partners that I've worked with who have come into contact with the defendant." Although Detective Rodriguez's opinion about Crockett's BPS membership thus appears to have been based, at least in part, on hearsay, Rodriguez's testimony was too general to allow us to determine whether the hearsay was *testimonial* in nature, and thus violated the confrontation clause. (See *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 413 [expert's testimony about information received from informants did not violate confrontation clause where he "did not testify to any particular statement made by any one person to him about [co-defendant's] gang affiliation," and there was "no indication [the information] was gathered as part of the investigation of completed crimes, and none of the information was sworn. As *Sanchez* makes clear, to violate *Crawford*, the out-of-court statement must be made under circumstances that entail some formality or solemnity"]; but see *People v. Pettie* (2017) 16 Cal.App.5th 23, 63 [confrontation clause violation occurred where gang expert testified to detailed descriptions of defendant's gang-relating clothing and associations with known gang members that had been gleaned from police reports documenting completed crimes and written by officers unavailable for cross-examination].)

Crockett asserts that "to the extent that Officer Rodriguez did not give enough information to determine whether the statements were testimonial . . . they should be treated as testimonial." But the failure to develop the record in this regard does not redound to Crockett's benefit. As the court held in *People v. Ochoa* (2017) 7 Cal.App.5th 575, 584–585, 586 (*Ochoa*), fn. omitted, italics added: "Had defendant lodged contemporaneous [confrontation clause] objections during trial, the People, as the proponent of the evidence, would have had the burden to show the challenged testimony did not relate testimonial hearsay. [Citations.] [¶] *However, as no such contemporaneous objections were lodged, we cannot simply assume the admissions of gang membership . . . were testimonial hearsay* . . . . [¶] . . . [¶] To summarize, it is possible the admissions of gang membership related to the jury by [the testifying expert] came from police reports or other records and, thus, may have been testimonial hearsay under *Sanchez*. However, due to defendant's failure to object, the record is not clear enough for this court to conclude which portions of the expert's testimony involved testimonial hearsay. Accordingly, defendant has not demonstrated a violation of the confrontation clause." (See also *People v. Vega-Robles*, *supra*, 9 Cal.App.5th at p. 415 ["Under *Sanchez*, it appears that testimony about a nonparty's out-of-court admission that he or she is a gang member, offered to prove he or she *is* a gang member, is hearsay. [Citation.] However, no *Crawford* objection was interposed as to the classification forms on which [the witness] made his admissions, and the record does not contain sufficient information from which we can determine whether the classification documents in which [the witness's] admissions were

recorded rendered his admissions testimonial or not."].) Accordingly, Crockett has not demonstrated a violation of the confrontation clause.

c. Any violations of state hearsay law were harmless error.

Crockett did not object at trial to admission of the challenged testimony on hearsay grounds. Nonetheless, there is an arguable claim that, under *Sanchez*, admission of some of the expert's testimony at issue violated California hearsay law. Thus, we consider whether the jury's gang enhancement findings were prejudicially impacted by the improper admission of hearsay evidence under *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 671 [harmless error test for wrongful admission of evidence is *Watson* test of whether it is reasonably probable more favorable result would have been reached without the error].)

It seems clear that the hearsay at issue in the present case—Crockett's monikers and his self-admission of his gang membership to other officers—is case-specific, rather than general background. However, although Detective Rodriguez arguably related inadmissible hearsay to the jury, it is not reasonably probable Crockett was prejudiced by its admission because there was other, significant, non-hearsay evidence tending to prove Crockett's gang membership. That evidence included the following:

(1) *Tattoo evidence*: Detective Rodriguez testified that Crockett had two body tattoos that signaled his membership in the BPS gang. First, the letters "BPS" were tattooed across the back of Crockett's neck, and Detective Rodriguez testified this was one of the "more common tattoos" worn by BPS members.

Second, Crockett's torso bore a tattoo depicting a large, stylized dollar-sign, which—according to Detective Rodriguez—signaled that "Crockett is part of the inner cli[que] within the Jungles [(itself a subset or clique of the BPS gang) which was named] the Stevely Crew."[9]

(2) *Detective Rodriguez's testimony regarding Crockett's association with other known BPS members*: Detective Rodriguez identified the person standing next to Crockett in the Myspace photograph as Christopher Singh, whom Detective Rodriguez personally knew to be a member of BPS.[10] Two other police officers, Officer Corso[11] and Detective Washington, also testified Singh was present in apartment 187 at the time of the police raid. Detective Rodriguez also testified that he had examined surveillance footage from the attempted pawnshop robbery and

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[9] Hence, Crockett's Stevely tattoo was not the kind of generic, not-necessarily-a-gang-tattoo at issue in *People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1254 [tattoo evidence was "comparatively weak" where "defense gang expert testified that a 'West L.A.' tattoo did not necessarily indicate gang membership. Tattoos are ubiquitous, and 'West L.A.' does not indubitably signify gang allegiance in the way that a more specific tattoo, such as 'Inglewood 13,' would."].) Rather, testimony regarding Crockett's Stevely tattoo was precisely the kind of testimony held admissible by our Supreme Court to establish gang membership. (See *Sanchez*, *supra*, 63 Cal.4th at p. 677.)

[10] Detective Rodriguez testified he had had numerous contacts with Singh and knew him to be a BPS gang member.

[11] LAPD Officer Alfred Corso, part of the SWAT team involved in Crockett's arrest, testified that he saw Singh run from apartment 187 just before Crockett started shooting.

had identified Baleegh Brown, whom he personally knew to be an active BPS member, to be one of the three participants. Finally, Detective Rodriguez testified that he personally knew J.B. Jennings, whom Officer Corso testified had run from apartment 187 shortly before the police raid, to be a member of the Jungles clique of the BPS gang.

(3) *Detective Washington's testimony regarding his efforts to locate Crockett*: LAPD Detective Washington testified that because of his expertise regarding the BPS gang, police investigators came to him for help in locating Crockett following the Wachovia Bank and pawnshop crimes. Although Detective Washington had not had any direct personal contact with Crockett, he testified he was familiar with Crockett: ". . . I had seen him in [BPS territory] over the years that he's been a member of the Black P Stone gang." Detective Washington testified he knew that the BPS gang had taken control of apartment 187 from its tenant, Richard Bowens, and that gang members were using the apartment for drug trafficking. Detective Washington testified that by talking to people (both gang members and other citizens) in the area where Crockett hung out, he located several residences frequented by Crockett, one of which was apartment 187. Detective Washington was insistent that he had not done any special research to prepare his trial testimony because he "was familiar with [Crockett] through other gang members and other citizens and community members within the area that he resided and committed crimes."

Taken together, the totality of this non-hearsay evidence provided overwhelming proof that Crockett was a BPS member. Accordingly, the admission of hearsay testimony to establish Crockett's gang membership was harmless.

3. *The premeditation finding.*

Crockett contends that the jury's finding that the attempted murder of the pawnshop victim was premeditated was based on a "natural and probable consequences" theory of liability, and thus that it must be reversed. We disagree.

In *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*), our Supreme Court held: "[W]ith respect to the natural and probable consequences doctrine as applied to the premeditation allegation under section 664(a) [the statute defining premeditated attempted murder], attempted murder – not attempted premeditated murder – qualifies as the nontarget *offense* to which the jury must find foreseeability. Accordingly, once the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated. [¶] Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Id*. at pp. 879–880.) *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), subsequently held that "an aider and abettor may not be convicted of first degree *premeditated murder* under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]" (*Id*. at pp. 158–159, second italics added.)

Crockett argues the reasoning of *Chiu* "compels the

overruling of *Favor*." However, until our high court overrules *Favor*, it remains good law and precludes Crockett's argument that he must have personally foreseen the premeditated nature of the attempted murder, and cannot be sentenced to life imprisonment without a jury finding of that fact.[12] (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

4. *Sentencing claim based on new statutory authority*.

Crockett contends he is entitled to the benefit of Senate Bill 620, which went into effect on January 1, 2018. We agree.

In post-argument briefing, Crockett contends that, as a result of Senate Bill 620, signed by Governor Brown on October 11, 2017, this matter must be remanded for the trial court to exercise discretion as to whether to strike the section 12022.53 enhancement. As relevant here, Senate Bill 620 provides that

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[12] Our Supreme Court granted review in *People v. Mateo*, S232674, *supra*, to decide the following issue: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor*[, *supra*,] 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) [570 U.S. 99] [133 S.Ct. 2151] and *People v. Chiu* (2014) 59 Cal.4th 155?" (<http://appellatecases.courtinfo.ca.gov> [as of July 11, 2019].) The court subsequently transferred the matter back to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of S.B. 1437, without deciding the issue. As we discuss *post*, S.B. 1437 does not apply to the offense of attempted murder. Therefore, as to attempted murder, S.B. 1437 has not abrogated the natural and probable consequences doctrine, and the question posed in *Mateo* remains unanswered.

effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike a sentencing enhancement under that section. The new provision states as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Senate Bill 620 went into effect January 1, 2018. Because appellant's conviction is not yet final, appellant is eligible to have the matter remanded for resentencing because the amended statute granting discretion to the trial court has the potential to lead to a reduced sentence. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 (*Estrada*) [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].)

5. *The gang enhancements and articulation of sentence.*

When the trial court sentenced Crockett, it noted that the jury had made true findings as to the charged gang enhancements. Nonetheless, the court neither imposed nor struck the additional punishment associated with those findings, stating that such additional punishment was not applicable under *People v. Lopez* (2005) 34 Cal.4th 1002, 1006 [holding that a gang-related first-degree murder could not be enhanced by 10 years as a violent felony under section 186.22, subdivision (b)(1)(C), but "[fell] within that subdivision's excepting clause and

is governed instead by the 15-year minimum parole eligibility term" of section 186.22, subdivision (b)(5)]. The court explained as follows: "As pointed out by the district attorney and referenced in *People* [*v.*] *Lopez*, the court is apprised of the fact that the 10-year enhancement [(§ 186.22, subd. (b)(1)(C))] is not applicable to the life sentences in this matter and that its impact is only the minimum eligibility parole date which is 15 years [(§ 186.22, subd. (b)(5))]. In light of the sentences, in essence, [section 186.22, subd. (b)(5)] does not have any application because the sentences are in excess of the 15-year parole eligibility minimum in this matter."

In a letter dated January 16, 2018, we asked the parties to address in supplemental briefs whether the trial court's failure to either strike or impose sentence in connection with true findings on the gang enhancements resulted in an unauthorized sentence. The parties did so on January 19 and 26, 2018.

Having considered the parties' responses, we conclude that as to counts 6, 7, 8, and 9, the trial court was required to either impose or strike the additional punishment associated with the gang enhancements. In *People v. Montes* (2003) 31 Cal.4th 350, 352 (*Montes*), our Supreme Court held that the *Lopez* rule applies "only if the defendant commits a felony that, *by its own terms*, provides for a life sentence." (Italics added.) The felonies of which defendant was convicted in counts 6, 7, 8, and 9 did not "by [their] own terms" provide for a life sentence; instead, those felonies carried determinate base terms, to which were added 25-year-to-life *enhancements* pursuant to section 12022.53, subdivision (d). Accordingly, the trial court was required to impose or strike "an additional term of 10 years" for counts 6, 7, 8, and 9, pursuant to section 186.22, subdivision (b)(1)(C).

The trial court also was required to impose or strike the additional punishment associated with the gang enhancement as to count 4. As to count 4, the court imposed a life sentence on the base term (making defendant eligible for parole in seven years) (§ 3000.1, subd. (a)(2)), to which was added a 25-year-to-life *enhancement* pursuant to section 12022.53, subdivision (d). Accordingly, under *Montes*, the court was required to either impose or strike a 15-year minimum parole eligibility on the base term pursuant to section 186.22, subdivision (b)(5).

Finally, as to count 22, the court imposed a five-year base term, with no additional sentence for the gang enhancement. Under section 186.22, subdivision (b)(4)(B), however, the court was required to sentence defendant to an indeterminate term of 15 years to life.

On remand, therefore, we direct the court to either strike or impose sentence pursuant to section 186.22 as to counts 4, 6, 7, 8, and 9; and to apply the alternative sentencing scheme of section 186.22, subdivision (b)(4)(B), as to count 22. We further direct the trial court on remand to separately articulate the determinate and indeterminate portions of the defendant's sentence, as required by section 669, subdivision (a).

6. *S.B. 1437.*

While Crockett's appeal was pending, the Legislature enacted S.B. 1437. That legislation, which took effect on January 1, 2019, "addresse[d] certain aspects of California law regarding felony murder and the natural and probable consequences doctrine." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*).) S.B. 1437 "redefined 'malice' in section 188. Now, to be convicted of murder, a principal must act with malice aforethought; malice can no longer 'be imputed to a person based

solely on [his or her] participation in a crime.' (§ 188, subd. (a)(3).)" (*In re R.G.* (2019) 35 Cal.App.5th 141, 144.) S.B. 1437 also amended section 189, which defines first and second degree murder, by, among other things, adding subdivision (e). That subdivision states that a participant in a target crime, who did not actually commit a killing, is liable for murder only if he or she aided and abetted the actual killer in commission of first degree murder, with the intent to kill, or was a major participant in the underlying felony and acted with reckless indifference to human life. (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.) S.B. 1437 thus "ensure[s] that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147.) S.B. 1437 also added section 1170.95, which permits persons convicted of murder under a natural and probable consequences theory to petition in the sentencing court for vacation of their convictions and resentencing, if certain conditions are met. (*In re R.G.*, at p. 144; *Martinez*, at p. 723.)

Relying on *Estrada*, *supra*, 63 Cal.2d 740, Crockett contends that S.B. 1437's ameliorative provisions apply retroactively to him and require that we vacate his conviction on count 4, the attempted murder of Robert H. at the pawnshop. The People disagree. They aver that (1) under S.B. 1437, a defendant must seek relief via the section 1170.95 petitioning procedure, rather than on direct appeal; and (2) S.B. 1437 applies only to persons convicted of murder, not attempted murder. The People are correct.

Generally, penal statutes do not operate retroactively. (§ 3;

People v. Brown (2012) 54 Cal.4th 314, 319, 324.) But, under the rule of *Estrada*, a statute lessening punishment is presumed to apply to cases that are not yet final on the statute's effective date, unless the Legislature clearly signals its intent to make the amendment prospective, either by including an express saving clause or its equivalent. (*Estrada*, *supra*, 63 Cal.2d at pp. 744—745, 748; *People v. Nasalga* (1996) 12 Cal.4th 784, 792—793; *Martinez*, *supra*, 31 Cal.App.5th at pp. 724—725.)

A petitioning procedure like that created by section 1170.95 amounts to just such an indication that the Legislature intended an ameliorative provision to apply prospectively only. When the Legislature creates a statutory procedure by which defendants may avail themselves of a change in the law, that remedy must be followed and relief is not available on direct appeal.

For example, in *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), our Supreme Court considered whether Proposition 36, the Three Strikes Reform Act of 2012, applied retroactively. Proposition 36 reduced the sentence for some offenders whose third strike was not serious or violent. (*Conley*, at p. 652; *Martinez*, *supra*, 31 Cal.App.5th at p. 725.) It also created a postconviction procedure, section 1170.126, by which prisoners could seek resentencing for offenses that, had they been committed after Proposition 36's effective date, would have resulted in a lesser sentence. (*Conley*, at p. 653.)

Conley considered whether defendants whose convictions were not final when Proposition 36 went into effect were entitled to automatic resentencing on direct appeal. (*Conley*, *supra*, 63 Cal.4th at pp. 652, 655.) The court concluded that the section 1170.126 procedure was the exclusive means by which persons sentenced before Proposition 36's effective date could seek relief.

(*Conley*, at pp. 661—662; *Martinez*, *supra*, 31 Cal.App.5th at p. 725.) Proposition 36 was "not silent on the question of retroactivity. Rather, [Proposition 36] expressly addresses the question in section 1170.126, the sole purpose of which is to extend the benefits of the Act retroactively." (*Conley*, at p. 657.) Section 1170.126 drew "no distinction between persons serving final sentences and those serving nonfinal sentences, entitling both categories of prisoners to petition courts for recall of sentence under the Act." (*Conley*, at p. 657.) Further, resentencing was subject to the trial court's evaluation of whether a prisoner's early release would pose an unreasonable risk of danger to public safety. (*Id.* at p. 658.) "Where . . . the enacting body creates a special mechanism for application of the new lesser punishment to persons who have previously been sentenced, and where the body expressly makes retroactive application of the lesser punishment contingent on a court's evaluation of the defendant's dangerousness, we can no longer say with confidence, as we did in *Estrada*, that the enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review." (*Id.* at pp. 658—659.)

The court came to the same conclusion in regard to resentencing under Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597 (*DeHoyos*).) Proposition 47 reduced a variety of drug- and theft-related offenses from felonies to misdemeanors, and enacted section 1170.18, which created a petitioning procedure akin to that created by Proposition 36. (*DeHoyos*, at pp. 597—599.) *DeHoyos* explained: "Like [Proposition 36], Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of

provisions designed to extend the statute's benefits retroactively," including a recall and resentencing mechanism for persons who were serving sentences for covered offenses as of Proposition 47's effective date. (*Id.* at p. 603.) Section 1170.18 did not distinguish between persons serving final sentences and those serving nonfinal sentences, but entitled both to petition for recall. And, as with Proposition 36, resentencing depended on the trial court's assessment of the defendant's public safety risk. (*DeHoyos*, at p. 603.) Thus, the court concluded, resentencing was available to such defendants only in accordance with the statutory resentencing procedure set forth in section 1170.18. (*DeHoyos*, at p. 597.)

Martinez came to the same conclusion regarding the retroactivity of S.B. 1437. The court explained: "The analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, [S.B. 1437] is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication [S.B. 1437] should not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez*, *supra*, 31 Cal.App.5th at p. 727.) Among other things, the section 1170.95

procedure gives the parties the opportunity to "go beyond the original record in the petition process, a step unavailable on direct appeal," providing "strong evidence the Legislature intended for persons seeking the ameliorative benefits of [S.B. 1437] to proceed via the petitioning procedure. The provision permitting submission of additional evidence also means [S.B. 1437] does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials. This, too, indicates the Legislature intended convicted persons to proceed via section 1170.95's resentencing process rather than avail themselves of [S.B. 1437's] ameliorative benefits on direct appeal." (*Martinez*, at pp. 727—728; accord, *People v. Anthony*, *supra*, 32 Cal.App.5th at pp. 1147—1153; cf. *In re Taylor* (2019) 34 Cal.App.5th 543, 561—562.)

We agree with the foregoing analysis and adopt it here. S.B. 1437 does not allow for vacation of an appellant's conviction on direct appeal.

Crockett argues that the foregoing precepts do not apply to his crime of *attempted murder,* as opposed to completed murder. He urges that the petitioning procedure set forth by newly enacted section 1170.95 "by its terms" applies only to convictions for murder, not attempted murder. Therefore, he posits, as to *attempted* murder, the Legislature did not "provide a savings clause or similar procedure," and *Estrada*'s retroactivity rule must apply. Accordingly, he contends, he is entitled to the benefit of S.B. 1437's amendments, which he argues require reversal of his attempted murder conviction on count 4. But Crockett's argument proves too much. S.B. 1437 does not apply to his offense of attempted murder.

In any case involving statutory interpretation, our fundamental task is to determine the Legislature's intent, so as to effectuate the law's purpose. We begin with an examination of the statute's words, giving them a plain and commonsense meaning. (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141; *People v. Colbert* (2019) 6 Cal.5th 596, 603.) If not ambiguous, the plain meaning of the statutory language controls. (*People v. Stanley* (2012) 54 Cal.4th 734, 737; *People v. Montiel* (2019) 35 Cal.App.5th 312, 318–319.)

As explained, S.B. 1437 amended two statutes, sections 188 and 189, and added section 1170.95. The plain language of each of these enactments compels the conclusion that S.B. 1437 pertains only to murder, not attempted murder. First, S.B. 1437 amended section 188 to add subdivision (a)(3), which states that "in order to be *convicted of murder,* a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Stats. 2018, ch. 1015, § 2, italics added.)

Second, S.B. 1437 added subdivision (e) to section 189. That subdivision provides: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) *in which a death occurs is liable for murder* only if one of the following is proven: [¶] (1) The person was the actual *killer*. [¶] (2) The person was not the actual *killer*, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual *killer* in the commission of *murder in the first degree*. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Stats. 2018, ch. 1015, § 3, italics added.)

Third, as Crockett points out and as the People argue, by its plain terms section 1170.95's petitioning procedure does not extend to attempted murder. Subdivision (a) states that a "person convicted of *felony murder or murder* under a natural and probable consequences theory" may petition for redesignation and resentencing. (§ 1170.95, subd. (a), italics added.) To establish entitlement to relief, the petitioner must show he or she was charged with murder; was convicted of first degree or second degree murder; and could not have been convicted of first or second degree murder due to changes to sections 188 or 189 wrought by S.B. 1437. (Stats. 2018, ch. 1015, § 4; § 1170.95, subd. (a).) The remainder of section 1170.95 likewise speaks only in terms of murder, not attempted murder.

The statute's uncodified statement of legislative findings and declarations reinforces this plain language. Therein the Legislature stated: "(f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, *as it relates to murder*, to ensure that *murder liability* is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life. [¶] (g) Except as stated in subdivision (e) of Section 189 of the Penal Code, *a conviction for murder* requires that a person act with malice aforethought. A person's *culpability for murder* must be premised upon that person's own actions and subjective mens rea." (Stats. 2018, ch. 1015, § 1, italics added; *People v. Canty* (2004) 32 Cal.4th 1266, 1280 [statements of purpose and intent may be used as an aid in construing legislation].)

That the Legislature intentionally excluded attempted murder from S.B. 1437's reach is also shown by its use of the

term "attempted" in section 189, subdivision (e). There, the Legislature expressly specified that the underlying, or "target," felony could be either completed or attempted. But, it omitted the word "attempted" from the same sentence when addressing the participant's liability for murder. (§ 189, subd. (e) ["A participant in the perpetration or *attempted perpetration* of a felony listed in subdivision (a) in which a death occurs *is liable for murder* only if one of the following is proven"], italics added.) " 'When the Legislature "has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." ' [Citation.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 880; *People v. Bland* (2002) 28 Cal.4th 313, 337; *People v. Tapia* (2005) 129 Cal.App.4th 1153, 1163.)

In short, the fact the Legislature did not include attempted murder in the text of section 1170.95 does not indicate an intent that the law be applied retroactively in cases of attempted murder. Instead, it demonstrates that the Legislature did not intend the law to apply to Crockett's offense of attempted murder *at all*.

DISPOSITION

Crockett's sentence is vacated and the matter is remanded for resentencing. On remand the trial court is directed to (1) strike or impose sentence pursuant to section 186.22 on counts 4, 6, 7, 8, and 9; (2) apply the alternative sentencing scheme of section 186.22, subdivision (b)(4)(B) in regard to count 22; (3) separately articulate the determinate and indeterminate portions of Crockett's sentence, as required by section 669, subdivision (a); and (4) exercise its discretion and determine whether to strike or dismiss the section 12022.53 firearm enhancements pursuant to section 12022.53, subdivision (h). The judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.